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Supreme Court, U.S.
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NO.___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN DOE, A MINOR, BY AND THROUGH HIS PARENT AND NEXT FRIEND, MARY DOE,

PETITIONER

VS.

SUMNER COUNTY BOARD OF EDUCATION,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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26 pp

QUESTIONS PRESENTED

20 U.S.C. Section 1415(e)(2) governs judicial review of administrative hearings under the Education for All Handicapped Children Act, 20 U.S.C. Section 1401, et. seq.

1. May a court reviewing a case under 20 U.S.C. Section 1415(e)(2) remand the case to the administrative agency?

2. If remanding the case is not barred by 20 U.S.C. Section 1415(e)(2), is the decision to remand committed to the discretion of the reviewing court?

3. May a court reviewing a case under 20 U.S.C. Section 1415(e)(2) review individualized education programs developed after the administrative hearing?

PARTIES

The parties to the proceeding below were Petitioner John Doe and Respondent

Board of Education of Sumner County. Charles Smith, Commissioner of the Tennessee Department of Education, was a Defendant in the District Court but was not a party in the Court of Appeals.

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34 C.F.R. SECTION 300.512, 12, 19

OTHER AUTHORITIES:

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 879 F.2d. 1340 (1989). The decision of the United States District Court for the Middle District of Tennessee (Nixon, D.J.) is reported at 1987-88 Education of the Handicapped Law Report DEC. 559:391. The order of the Tennessee State Department of Education is not reported. All three decisions are set forth in the Appendix.

JURISDICTION

The Sixth Circuit's opinion was filed on July 13, 1989. On August 10, 1989, the Circuit Court denied Petitioner's petition for rehearing. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

1. 20 U.S.C. Section 1415(e)(2):

Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

2. 20 U.S.C. Section 1415(f):

Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.

STATEMENT OF THE CASE

Petitioner is a handicapped child within the meaning of the Education for All Handicapped Children Act, 20 U.S.C. Section 1401, et. seq. For the purpose of this petition, the relevant facts are as follows:

Petitioner's parents placed him in a private school after a request for the private school placement was refused by the school system. Petitioner attended this school during the 1986-1987 school year.

Petitioner's parents requested an administrative hearing under 20 U.S.C. Section 1415(b)(2) to obtain reimbursement. The administrative hearing officer heard two days of testimony on March 4, and March 23, 1987.

The hearing officer's order, setting forth findings of fact and law, was entered on April 10, 1987. The hearing officer

found, among other things, that the private school was an appropriate placement for Petitioner. He ruled, however, that the parents did not have a right to seek reimbursement for the 1986-1987 school year. Therefore, he did not decide whether the school system was able to provide an appropriate placement for Petitioner. His order required the parents and the school system to meet to discuss an individualized education program (IEP) for the upcoming 1987-1988 school year.

On May 28, 1987--subsequent to the administrative decision but prior to judicial review--Petitioner's mother met with school system officials as required by the hearing officer's order. School system officials proposed an IEP placing Petitioner at a public high school. Again, Petitioner's mother rejected the school system's proposed placement in favor of the

private school.

On June 12, 1987, the parents appealed the hearing officer's decision to the District Court by filing a supplemental complaint in a previously filed action. The Court had jurisdiction of the appeal under 20 U.S.C. Section 1415(e)(4)(A).

The District Court heard additional evidence at a hearing on September 28, 1987. On March 11, 1988, the District Court issued a memorandum and order. The Court held that the administrative hearing officer erred in ruling that Petitioner had no right to seek reimbursement.

On the merits, the District Court looked to 20 U.S.C. Section 1415(e)(2) and Board of Education v. Rowley, 458 U.S. 176 (1982) for the principles governing the District Court's review. Relying on the statute and Rowley, the District Court ruled that the private school was the least

restrictive environment in which Petitioner could receive the free appropriate public education to which he was entitled by the Act. Accordingly, the Court ordered reimbursement for the 1986-1987 and 1987-1988 school years.

The Sixth Circuit reversed and remanded in an opinion filed on July 13, 1989. The Sixth Circuit agreed that the administrative hearing officer wrongfully decided that Petitioner was not entitled to seek reimbursement. The Circuit Court ruled, however, that the District Court erred in deciding the case on the merits. The Circuit Court said that the District Court should have remanded the issue of reimbursement for the 1986-1987 school year to the administrative hearing officer. Otherwise, there was a failure to exhaust administrative remedies.

The Sixth Circuit also said that there

would have to be an additional administrative hearing relating to the IEP proposed by the school system and rejected by Petitioner during the pendency of judicial review. The Court denied a petition for rehearing on August 10, 1989.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Sixth Circuit conflicts with the plain language and legislative history of 20 U.S.C. Section 1415(e)(2) and decisions of this Court and other Circuits interpreting that statute.

A. The statute.

The last sentence of 20 U.S.C. Section 1415(e)(2) provides:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

The decision of the Sixth Circuit is in direct conflict. The statute directs the reviewing court to decide the case and make a determination of appropriate relief. The Sixth Circuit has ruled that the District Court erred because it decided the case and granted appropriate relief.

Petitioner's argument that there is a conflict with the statute is supported by legislative history. Congress considered and rejected a review procedure that involved remanding cases to state administrative agencies.

The House version of the Act established a grievance procedure at Section 617. H.R. Rep. No. 332, 94th Cong., 1st. Sess., at 55-56 (1975). Section 617(d)(3) provided:

> The findings of fact of a State educational agency with respect to any determination of such agency under paragraph (1) shall be conclusive in any court of the

> United States if supported by substantial evidence, except that the court involved, for good cause shown, may remand the case to the State educational agency to take further evidence. Any new or modified findings of fact made by the state educational agency shall be conclusive if supported by substantial evidence.

This version of the Act was rejected during conference in favor of the provisions that are now found at 20 U.S.C. Section 1415. S. Rep. No. 455, 94th Cong., 1st Sess., at 47-50 (1975).

B. Decisions of this Court.

In Board of Education v. Rowley, 458 U.S. 176 (1982), the Court granted certiorari to consider "the role of state and federal courts in exercising the review granted by 20 U.S.C. Section 1415." 458 U.S. at 186. After study of the Act's purpose and legislative history, including the legislative history set forth above, 458 U.S. at 205, the Rowley Court announced

a two part test to be applied by courts reviewing cases under 20 U.S.C. Section 1415(e)(2): "First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" 458 U.S. at 206-207.

The Sixth Circuit has now added a third question that precedes, and--depending on the answer--supersedes the test established by this Court. "Is there an issue in this case that was not addressed at the administrative level?" If the answer to that question is yes, the reviewing court remands. The reviewing court does not apply Rowley; to do so is error.

The Sixth Circuit's decision also conflicts with Burlington School Committee

v. Department of Education, 471 U.S. 359 (1985). That case defined the power of the reviewing court under 20 U.S.C. Section 1415(e)(2). "The statute directs the court to 'grant such relief as [it] determines is appropriate.' The ordinary meaning of these words confers broad discretion on the court." 471 U.S. at 379.

Thus, even if remands were consistent with 20 U.S.C. Section 1415(e)(2), the statute and Burlington indicate that the decision to remand would be committed to the discretion of the reviewing court.

C. Other Circuits.

In Dubois v. Connecticut State Board of Education, 727 F.2d. 44 (C.A. 2, 1984), the District Court dismissed plaintiff's complaint for failure to exhaust administrative remedies after finding that the administrative record was "incomplete." 727 F.2d. at 48. The Second Circuit

reversed, 727 F.2d. at 47:

> We agree with the district judge's assessment that the administrative record is 'incomplete,' in the sense that it lacks the data necessary to reach a finding that Scott was a handicapped child. The absence of the necessary data, however, does not mean that the proper administrative route was not followed by Dubois. . . . The January 1981 decision by the Department's hearing officer was definitive and final. . . . and it left no further administrative steps for Dubois to take.

The Sixth Circuit has ruled that the error of the administrative law judge in this case can somehow be attributed to Petitioner as a failure to exhaust administrative remedies. There is a direct conflict with Dubois.

Both the Third and Fourth Circuits have held that remanding cases to the administrative level violates 20 U.S.C. Section 1415(e)(2) and 34 C.F.R. Section 300.512. In Muth v. Central Bucks School

District, 839 F.2d. 113 (C.A. 3, 1988), rev'd on other grounds, Dellmuth v. Muth, 491 U.S. ___, 109 S.Ct. 2397 (1989), the Court said, 839 F.2d. at 124:

> While in many contexts the power to remand is inherent in the concept of appellate review, in the context of the EHA a remand following an 'impartial review' is fundamentally inconsistent with the statutory scheme. As we have earlier noted, the EHA and its implementing regulations reflect the importance not only of procedural protections but also of prompt resolution of disputes over the proper education of a handicapped child. Section 300.512 of the regulations, for example, imposes a stringent timetable that, absent reasonable requests for continuances, guarantees an administratively final and judicially reviewable decision no later than 75 days from the date of receipt of the request for a due process hearing.

Muth involved remands from one administrative level to another in a state with a two tier review system. (Under 20 U.S.C. Section 1415(c), states may elect a

one or two level system.) Muth is equally applicable to remands from a reviewing court to the administrative level.

Muth was followed by the Fourth Circuit in Devries by Deblay v. Spillane, 853 F.2d. 264 (C.A. 4, 1988), at 267:

> The new IEP continues to provide for plaintiff's schooling at a place other than Annadale. Thus, the complaint of plaintiff, before the administrative tribunals, is the same as that before the district court, namely that he be educated at Annadale.
>
> It is true that the new IEP is different from the old so that the factual findings of the administrative tribunals made as to the earlier IEP are not precisely pertinent to the new IEP. Classically, that is a reason for reexhaustion which essentially is the equivalent of a remand. However, the EHA provides for a different result. The district court under the EHA 'shall hear additional evidence at the request of a party.' The Third Circuit has recognized that a remand is inconsistent with that statutory scheme. Muth v. Smith [Citation omitted] . . . . So, too, is reexhaustion inconsistent with the statutory scheme when the complaint remains

inconsistent with the statutory scheme when the complaint remains the same though the IEP's change.

In this case, Petitioner's claim was the same for the 1986-1987 and 1987-1988 school years. The Sixth Circuit's ruling that a separate administrative hearing was required because a new IEP was proposed during the pendency of the District Court's review is in direct conflict with Devries.

II.

The decision of the Sixth Circuit will create significant confusion as to the effect of the Education for All Handicapped Children Act on other laws.

The effect of the Act on other laws was addressed by this Court in Smith v. Robinson, 486 U.S. 992 (1984). The Court ruled that a Plaintiff could not seek relief under other statutes if the claim could be asserted under the Education for All Handicapped Children Act.

Two years after Smith, Congress passed

the Handicapped Children's Protection Act, Pub. L. No. 99-372, 100 Stat. 796 (1986). Section 3 of this bill, now codified at 20 U.S.C. Section 1415(f), overruled Smith:

> Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part. (Emphasis added).

This provision is based on the construction of the various laws urged by Justices Brennan, Marshall, and Stevens in the dissenting opinion in Smith authored by Justice Brennan.

The Sixth Circuit decision in this

case conflicts with the decisions of other Circuits as to when administrative procedures under the Act have been exhausted. Even if there were no other Circuit Court decisions on the issue, this opinion would cause considerable confusion in determining the point at which exhaustion occurs. Because application of 20 U.S.C. Section 1415(f) requires such a determination, the Sixth Circuit's decision in this case threatens to undo the settlement of this issue, which has already required a Supreme Court decision, and an Act of Congress, reversing that decision.

III.

The decision of the Sixth Circuit will cause needless delays in judicial review and irreparable injury to handicapped children.

This Court has expressed concern over the amount of time consumed by the review process. "As this case so vividly

demonstrates, however, the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." Burlington, supra, 471 U.S. at 370.

The Court's concern is appropriate, because delay in the review process harms handicapped children. The First Circuit relied on legislative history for this proposition in Town of Burlington v. Department of Education, 736 F.2d. 773 (C.A. 1, 1984), aff'd on other grounds, 471 U.S. 359 (1984) at 736 F.2d. 800: "Congress, through the principal author of the Act, has spoken unequivocally in this regard: 'I cannot emphasize enough that delay in resolving matters regarding the educational program of a handicapped child is extremely detrimental to his development.'"

The decision of the Sixth Circuit will cause needless delays. The Act imposes severe time limits on the administrative process. See, 34 C.F.R. Section 300.512. The Act is also "difficult . . . to interpret and effectuate." Burlington, supra, 736 F.2d. at 802. Under these circumstances, the administrative record may be flawed in many cases reviewed under 20 U.S.C. Section 1415(e)(2).

Likewise, the Sixth Circuit's ruling that a District Court cannot review IEP's proposed after the administrative hearing but before judicial review is an elevation of form over substance that prolongs disputes instead of solving them.

The waste of time and resources that will result from the Sixth Circuit's decision is unnecessary given the additional evidence clause of 20 U.S.C. Section 1415(e)(2). Flaws in the

administrative record and events that occur during the pendency of judicial review that do not alter the basic nature of the dispute are easily addressed through the introduction of additional evidence.

CONCLUSION

The Act creates a balance between the integrity of the administrative process, the need for quick resolution of disputes, and the right of handicapped children to pursue other remedies. This balance will be destroyed by the Sixth Circuit's decision in this case.

Respectfully submitted,

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